HANIFF v. DUSTAGIR.

[O. C. J. (Callow J.) September 27, 1948]

[Malacca — Civil Suit No. 6 of 1948]

Contract — Undue influence — Accord and satisfaction.

In this case the plaintiff claimed his share of profits and allowances in a partnership business. The defendant pleaded that the plaintiff had by agreement in writing agreed to accept $2,580 in full settlement. The plaintiff pleaded (1) that the agreement was null and void as his signature was obtained by undue influence of one Badsha and (2) that a larger sum being due, acceptance of a lesser amount could not satisfy the debt.

Held: (1) the plaintiff had failed on the evidence to show that the defendant had possessed or exercised a general influence and dominance over the will of the plaintiff and therefore the plea of undue influence failed; (2) the agreement was valid as it was an agreement to discharge an unliquidated, uncertain and disputed demand, and not a liquidated debt.

Cases referred to:—

(1) *O'Rorke v. Bolingbroke* (1877), 2 App. Cas. 814, 823.

(2) *Smith v. Kay* 11 E.R. 299.

(3) *In re Fry, Whittet and Bush* 40 Ch. D. 323.

(4) *Huguenin v. Baseley* (1807), 14 Ves. 273; *White & Tudor's* Leading Cases, 2nd ed. p. 280.

(5) *Evans v. Powis* (1847) 1 Ex. 601.

(6) *Cumber v. Wane* (1718), Str. 426; *Smith's* Leading Cases 12th ed. p. 389.

CIVIL SUIT.

C. S. Jayaswal for the plaintiff.

S. Shanmugam for the defendant.

Callow J. : — The claim filed is as follows:—

1. That the alleged agreement dated the 4th day of December 1947 made between the defendant of the one part and the plaintiff of the other part be declared null and void;
2. To have an account taken of the business transactions of Gomes & Dustagir Company for the period from 21st September 1946 to 4th December 1947 both days inclusive for the purpose of ascertaining the nett profits of the said Gomes & Dustagir Company for the said period so as to arrive at the 10% of the nett profits to which the plaintiff is entitled under the terms of the said agreement dated the 21st day of September 1946 and for all necessary and consequential accounts inquiries and directions;
3. For payment of the monthly allowance of $50 for the period from 21st September 1946 to 4th December 1947 both days inclusive less amounts withdrawn by the plaintiff;
4. For repayment of the said deposit of $1,500;
5. Costs of this suit.

Pleadings were filed, and in the defence liability of $2,580 was admitted, reliance being placed on the agreement (Ex. I/21) by which the plaintiff is alleged to have accepted this sum in full settlement.

The hearing occupied five days. I think much time might have been saved if the plaintiff had pursued his order for the inspection of documents. It is submitted that full disclosure was not afforded, but if that was so the plaintiff could have sought the aid of the Court, or applied for the determination of any preliminary point in difference, with a consequent order. On several occasions during the trial Mr. Jayaswal for the plaintiff complained of embarrassment owing to prior inability to inspect fully all relevant documents and accounts in the defendant's possession. In my view such matters should be determined and settled before the proceedings open in Court. I mentioned this because it is not the first occasion on which I have experienced absence of full preparation in civil suit. The Assistant Registrar informs me it is impossible for the Court to ensure effectuation, and it must be a matter in which practitioners really desire to accomplish, but perhaps have not the time or overlook. No doubt these observations will bear fruit to the benefit of all concerned.

By the claim and pleadings it is manifest that the major and first raised issue is the plea that the agreement (Ex. I/21) should be declared null and void because the plaintiff's signature was obtained by undue influence.

The plaintiff alleged that he was in bed about 11 p.m. on the 4th of December, 1947 (he subsequently changed this date to December 3rd) when one Gulam Mohidin (not a witness) came and in consequence he (the plaintiff) went to the shop of R. E. Mohamed Kassim where he was induced to sign the agreement (Ex. I/21).

In evidence the plaintiff did not aver that the *defendant* used inducement or persuasion to obtain the requisite signature; he said that *Batah* (later described as Badsha, 2 D.W.) conducted the conversation. Indeed, except for a reply in examination which was ambiguous as to date, place and time, referring to six dozen hoes (changkuls), there is no suggestion of any direct communication between the parties on the evening the agreement (Ex. I/21) was signed.

The undue influence is alleged to have come from Badsha (2 D.W.) in expressions to the effect that if

the plaintiff refused to sign and sought legal aid and remedy he would obtain nothing.

As regards time I accept the defence evidence that it was earlier than 11 p.m. There is the evidence of the defendant and Badsha (2 D.W.) that it occurred about 8 p.m. and I accept this approximate hour.

The defence is that the agreement (Ex. I/21) was prepared by Badsha after the parties had negotiated to their satisfaction, and on being typed it was read over to and understood by the plaintiff who assented by his signature.

But assuming acceptance of all the plaintiff's evidence, which I cannot, does it amount to undue influence?

Mr. Jayaswal cited several cases, but none dealt with undue influence exercised by a third party. I suppose that such influence could be wielded by a third party as agent, but this point was not exhaustively argued. It seemed to be maintained that the plaintiff signed against his free will through fear imposed by Badsha in the presence of and acting on behalf of the defendant. Fraud was not alleged, neither was misrepresentation urged.

The first case cited is that of *O'Rorke v. Bolingbroke*[1]. This case deals with the disposal of family property, and the passage reads :—

> It sufficiently appears that the principle on which Equity originally proceeded to set aside such transactions was for the protection of family property; but this principle being once established, the Court extended its aid to all cases in which the parties to a contract have not met upon equal terms. In ordinary cases each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of the 'expectant heir,' or of persons under pressure without adequate protection, and in the case of dealings with uneducated ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract. **Evans v. Llewellyn** (1 Cox, 333) (cited before your Lordships in the argument) is a strong instance of this. Lord Kenyon, then Master of the Rolls, set aside a contract, notwithstanding full explanation to the Plaintiff of his rights, which were, moreover, rights in possession, upon the ground of want of due protection. He says: 'Here is a man destitute of money, and 200 guineas are suddenly offered him, which to a man in his circumstances is a very important sum, and he is then called upon to convey an estate in prejudice of himself and his family for the benefit of a person in affluent circumstances. It is said he was cautioned by Mr. Medlock (the Defendant's solicitor). It is true, and so far the parties did right, but they should not have permitted the man to have made the bargain without going to consult his friends.

I do not think this case bears comparison with the case now under consideration. The plaintiff is neither young, ignorant nor destitute; nor is the property of anyone other than himself involved. I was not fully convinced of his business prior to joining the defendant's firm. I shall deal with this later, but he said in his evidence that his turnover was from $40,000 to $50,000 per mensem. I find this difficult to believe, but it is the plaintiff's own evidence. If true it means he sacrificed the position of a principal and the profit on this turnover for a low salaried situation and a 10% commission which in some six months amounted to $3,100, or less than might be expected would amount to the profit of one month on a turnover of $40,000 to $50,000.

The next case cited was *Smith v. Kay*[2]. This case concerns fraud and misrepresentation, not undue influence, and the respondent Kay was a minor. He had been extravagant and had been accommodated by the plaintiff-appellant in large sums of money. The principle of this reported case is that Courts of Equity will protect infants and all persons in cases where influence is acquired and abused, and confidence reposed and betrayed.

I cannot find it sufficiently supports the plaintiff's case as to entitle him to have the agreement (Ex. I/21) set aside on the grounds of undue influence.

Counsel for the plaintiff went on to cite *In re Fry, Whittet and Bush*[3]. This again refers to an imposition on a poor and ignorant man. I cannot find the plaintiff is either. It is true that I urge all illiterates such as the plaintiff to refrain from intricate commercial transactions involving accounts; they are foolish to embark on such matters without the minimum qualification of literacy, but if they are so rash and then perhaps get worsted in compact, they should not bewail the results of nescience.

To plead undue influence it must be shown that the defendant possessed a general influence and dominance over the will of the plaintiff (*Sutton and Shannon on Contracts,* 2nd Edn. p. 159). *Halsbury* defines it as the unconscientious use by one person of power possessed by him over another in order to induce the other to enter into a contract (7 *Hailsham* 100). The mere fact of situation of Master and Servant is insufficient. Mr. Jayaswal did not cite, nor can I discover, any case in which it has been held that an employee could set aside the terms on which services were terminated on the grounds of undue influence. Contracts found to have been entered upon by the exercise of undue influence by one party may be set aside on the grounds of public policy. The Courts

will protect a party who can show he has been unfairly influenced to enter into an agreement under such circumstances as to preclude the exercise of free and deliberate judgment (*Huguenin v. Baseley*[4]), but a man of business cannot invoke such aid because he later discovers he has assented to an agreement granting him less favourable terms and results than on mature reflection he regards adequate. It should be observed that in the correspondence between the parties which subsequently ensued and which preceded this action, there is no mention of undue influence.

On the grounds of undue influence the plaintiff cannot succeed.

But as the hearing proceeded, and as learned Counsel for the plaintiff seemed apparently to appreciate the difficulties of his plea of undue influence, he enlarged his case to embrace the doctrine of accord and satisfaction, and argued that a larger sum being due, acceptance of a lesser amount could not satisfy the debt. The pleadings in paragraph 7 state there was no consideration, but it would appear that inadequate consideration is meant.

To adjudicate on this it is necessary to go back to earlier times. On re-occupation the plaintiff's business position was not made clear. According to his evidence he conducted his own business at 28 Riverside, Malacca, but later he and the defendant did business together, not it seems in partnership, but with mutual advantage. Still later, in examination, the plaintiff described the defendant and Gomes (2nd witness) as verbal partners, whatever that may mean.

However, on the 21st of September, 1946, a deed of partnership between the defendant and Gomes (2nd witness) was entered into (Ex. II). The plaintiff admits that this deed covered his former business interests which became merged with the firm of Gomes & Dustagir Company. His remuneration was to be $50 p.m. plus 10% commission on the profits as set out in clause 9 of the deed. He agrees that he understood the deed, knew his full rights therein, and was satisfied.

But a few days before, on the 15th of September, 1946, a curious document (Ex. I/20) was signed by the plaintiff. This document looks as if made preparatory to the drafting of Ex. II, but the evidence as to this is inconclusive. On the strength of this document (Ex. I/20) the plaintiff bases his claim for $1,500 (prayer iii). The document is not fully intelligible, it reading :—

I, B. M. Haniff hereby declare that I received from Messrs. Gomes & Dustagir Company, the sum of dollars One thousand and five hundred only ($1,500/-) against the Suspense account, being for my capital share with the above Company.

I hereby agree for the following conditions:—

1. The above capital share of $1,500/- (Dollars One thousand five hundred) will be refunded to me without when the above Company are taking the (stock taking) profit and loss account as per the agreement.
2. For the above capital of $1,500/- I agree for the profit share of 10% from the nett profit and a monthly allowance of $50/- (Dollars fifty only). Any increase or decrease will be proportionately considered as the business progresses, with regard to the above monthly allowance.
3. Any default in my character with the business I agree for the remuneration given by the other partners of the business.
4. I am entitle to have the business profit share of 10% only and not to demand of any of the business premises or the Furniture which are being used for the business as these premises and the furnitures is owned by the other two partners with their own capital.
5. During the absence of myself if I intend to go to India I am entitled to have my share profit only excepting the monthly allowances.
6. I will be faithful to the other partners mentioned (1) M. A. Gomes, (2) K. A. G. Dustagir.

This, the plaintiff submits, shows he invested the capital sum of $1,500 in the new Company of Gomes and Dustagir, and he now demands it back. Actually his evidence was that this sum was his share of profits due to him by Gomes and the defendant in September 1946 as the result of joint trading ventures; and was transferred to the firm of Gomes and Dustagir as a credit.

The defence is that the plaintiff never deposited any cash as capital, but to give him an interest and encouragement in the new Company he was credited with $1,500 in the suspense account. In the deed of partnership (Ex. II) a mention of this capital share would be expected, but there is none. The plaintiff said he read Ex. II and agreed to it, but his answers to examination on the omission were unhappy and unconvincing.

The system of book-keeping is not understandable. Abdul Latif (4th witness) who described himself as an accountant and who kept the books, could not explain them.

The preponderance of evidence on the point is in favour of the defence, and the facts I accept are that the firm of Gomes & Dustagir credited the plaintiff with the sum of $1,500 (precisely why I never fully understood). Then when his account with the firm showed a credit of $3,100 on the balance struck the 31st of March, 1947, the fictitious capital interest was cancelled.

At all events, up to the 31st of March, 1947, everything was well with the firm of Gomes & Dustagir, but in August the partners rifted. The breach widened and in November the partnership was dissolved, the defendant paying out to Gomes the sum of $22,000.

Gomes gave evidence and I believe much of his testimony. He seems to be more musician than merchant, and his laxity in business methods may perhaps be forgiven by or attributed to his artistic temperament. Nevertheless he very strongly objected to the defendant's assertion that after profitable business up to the 31st of March, 1947, a loss of $14,000 should result within the next six months. He didn't believe it, the plaintiff does not believe it, and I am extremely sceptical. If indeed it occurred then the defendant is either a fool or a very bad business man, and I do not think he is either. The plaintiff and Gomes obviously regard him as a rogue.

But it is apparent that on Gomes quitting the firm with a sum of $22,000, the plaintiff sought *his* account. He was disturbed to have Ex. I/17 to 19 explained to him, showing a credit of only $2,580, and there was no cash available to meet even that sum, indeed to this day not one dollar has been paid.

In opening Mr. Jayaswal carefully detailed the sum claimed. Basing his figures on the $22,000 to Gomes, he calculated the plaintiff's share amounted to $5,500; he then subtracted the plaintiff's withdrawals, added the deposit of $1,500 and said the claim totalled $6,609.68. But, learned Counsel for the defendant was quick to observe in addressing, there the figures ceased; there was no evidence apart from the item of $1,500, although the President of the Indian Chamber of Commerce (3rd witness) spoke of another item of $1,200 when the parties complained before him on the 3rd of November, 1947. I feel sure that Mr. Jayaswal was wrongly or insufficiently instructed, or woefully disappointed in proof, or he would not have opened in matters not produced in the hearing.

It all seems to come to this — the plaintiff is aggrieved at getting less from the defendant than he feels entitled to; he wishes the agreement (Ex. I/21) declared null and void, and an account taken as prayed in paragraph 8(ii) of the Statement of Claim.

But can that be done? Had there been proof of a liquidated sum, and I was lead to expect this on learned Counsel for the plaintiff's opening, then the position would be different, for there cannot be good accord and satisfaction of the whole of a liquidated debt by payment of part unless there be valuable consideration for giving up the remainder (*Evans v. Powis*[5]).

Learned Counsel for the plaintiff observed in closing that at no time had the defendant admitted any profit after the 31st of March, 1947; had such an admission been made the ultimate figures must have represented an unliquidated amount. Thus the Court was invited to calculate the plaintiff's claim on Mr. Jayaswal's figures based on the sum of $22,000 by which the defendant paid out Gomes on dissolution, such sum being arrived at in consequence of calculations derived from clause 9 of the partnership agreement Ex. II. But there is no evidence that this sum of $22,000 was arrived at by accountancy; Chunilal Manekchand Seth (3rd witness) said :—

> One day defendant came to my house and wanted to settle with Gomes.
>
> Gomes and defendant had a talk and agreed to $20,000/-.
>
> Defendant also agreed to give Gomes 28 Riverside. No valuation was affixed to the property.

And Gomes (2nd witness) said :—

> I took the matter to the Indian Chamber of Commerce about our partnership.
>
> I sought $25,000/- as my profit share, this in addition to withdrawals.
>
> We settled for $22,000/- being my share of profits from 21.9.46 to 24.11.47.

It is obvious that this sum was arrived at by negotiation. If indeed there was a loss subsequent to the 31st of March, 1947, Gomes would be called upon to suffer his proportion of such loss up to the date of dissolution of partnership.

I have no doubt that the plaintiff's claim was negotiated in similar manner to that of Gomes'. There is the evidence of the defendant and Badsha (2 D.W.) that the plaintiff sought $500 as his 10% share in profit from the 1st of April, 1947 to the 30th of November, 1947; evidently he too distrusted the allegation of a loss. This amount was reduced to $251.99 to make, after deduction of withdrawals, a total of $2,700. From this $120 was paid in kind by the acceptance of six dozen hoes, making a final agreed balance of $2,580.

In respect of the claim for wages it seems misconceived. The plaintiff seeks $50 p.m. with effect from the 21st of September, 1946 to the 4th of December, 1947 — that is his prayer. I think it a fair inference, and I accept the preponderance of evidence in favour of the defendant on this point, that the sum of $3,100 set out in Ex. I/17 represents the total liability due by the firm of Gomes & Dustagir to the plaintiff on the 31st of March, 1947. I find the account Ex. I/17 to 19, which the plaintiff accepts as to credits, is correct, and the plaintiff's wages are therein

set out. I accept the explanation by the defence of the reduction to $39 for the months of September, October and November 1947, and I find that the wages credit was included in the overall negotiations which resulted in the agreed sum payable to the plaintiff by the defendant of $2,700.

This is an unliquidated demand. The plaintiff disputes the defendant's *bona fides*. Had the books and accounts been properly gone into at an earlier stage some firmer basis might have been found, but I must try this cause on the evidence the parties chose to bring before the Court. An order was obtained to inspect, and the plaintiff alleges it was disobeyed; he had his remedy, and if he did not elect to pursue it, this Court cannot well demand books and accounts in the endeavour to convert a business dispute on profits to a liquidated debt.

It is clear from the evidence of the President of the Indian Chamber of Commerce (3rd witness) that the parties approached him to settle a business dispute. The plaintiff was very properly told that as he could furnish no detail, he would be well advised to settle, and to this the parties agreed, the complaint before the Indian Chamber of Commerce being withdrawn.

Then Badsha (2nd D.W.) conducted the negotiations, which were concluded on the evening of the 3rd of December, 1947, by the signing of Ex. I/21.

This agreement, voluntarily entered into by the plaintiff, discharged the unliquidated or uncertain and disputed demand by the payment to the plaintiff of the sum of $2,580. (*Cumber v. Wane*[6]). It cannot be set aside. It follows in consequence that the prayer for account must be refused.

Judgment is therefore entered for the plaintiff against the defendant for the admitted sum of $2,580.

Whereas no instalment has been paid as set out in the agreement (Ex. I/21) interest at the rate of 4% per annum will run to the date of this decree (R.S.C., O. 34, r. 42 Mallal's Straits Settlements Practice, page 229), on the item of $580 with effect from the 15th of January, 1948, and the five monthly instalments each of $400 with effect from the respective dates on which each instalment fell due, that is to say, the 15th of February, 1948, the 15th of March, 1948, the 15th of April, 1948, the 15th of May, 1948, and the 15th of June, 1948.

The costs of this suit shall be borne by the defendant up to the date of admission of liability, that is to say, the 22nd of April, 1948 and afterwards by the plaintiff; provided that any costs incurred by the plaintiff in consequence of errors by the defendant in his pleadings and amended on the record at the opening of the trial, shall be allowed the plaintiff.

Order accordingly

PUBLIC PROSECUTOR v. AMAR SINGH.

[O. Cr. J. (Storr J.) September 28, 1948]

[Ipoh — Criminal Trial No. 26 of 1948]

Criminal Trial — Identification — Penal Code s. 387.

In this case the accused was charged with attempted extortion. The evidence showed that the accused was arrested nearly two years after the alleged offence and was then produced to the witnesses in the gaol. No identification parade was held.

Held: (1) the usual and proper way of identifying persons suspected of a particular crime is to hold a proper identification parade; (2) on the facts and apart from the identification at the gaol there was a reasonable doubt as to the accused's participation in the offence and he ought therefore to be acquitted.

CRIMINAL TRIAL.

M. G. Neal (D. P. P.) for the Public Prosecutor.

Accused in person.

Storr J. : — In this case the accused was charged as follows :—

That you on or about the 1st May, 1946, at Changkat Tin, Tanjong Tualang, in the State of Perak, with 2 others unknown, in order to the committing of extortion attempted to put one Arokiam s/o Sinnappan in fear of a certain injury, to wit, death and thereby committed an offence punishable under s. 387 of the Penal Code.

The facts of the case briefly were that Arokiam, a bullock carter who, at that time, lived at Changkat Tin, Tanjong Tualang, had been robbed on the 29th of April, 1946, by 13 persons, and 2 days later, on 1st May, 1946, 2 Chinese and a Bengali came to his house and demanded $500 which, after a certain amount of haggling, was reduced to $200 under threat that if it was not paid he would be put in a sack, taken away, and cut to death. His evidence on this point was corroborated by his wife Silvamarie. He said that he made a report of the robbery some 2 days after the occurrence and at the same time reported this attempted extortion. However, the report, although not produced by the prosecution, was produced by Sergeant 527 of Tanjong Tualang, who recorded it, and who was called by the Court, and it was found that in that report no mention of any extortion was made.

Arokiam in his evidence said that the accused was the Bengali in the case. He further said: "I was able to identify the accused as I had known him for 5 years before that. I had known him quite well. We had met several times at the toddy shop and drank toddy." But in cross-examination by the accused he said: "No, I did not mention your name in the report because I did not know it .... You were not living